**WORLDWIDE AIR TRANSPORT CONFERENCE: CHALLENGES AND OPPORTUNITIES OF LIBERALIZATION**

**Montreal, 24 to 29 March 2003**

**Agenda Item 2: Examination of key regulatory issues in liberalization**
**2.3: Fair competition and safeguards**

# ALTERNATIVE MEASURES TO ENCOURAGE FAIR COMPETITION

(Presented by the United States of America)

**SUMMARY**

Proposals for "safeguard" mechanisms flow from an assumption that the United States does not share: that the removal of restraints on entry, pricing, capacity and other airline management decisions increases the potential for anticompetitive behavior, and that new measures are thus are necessary to ensure fair competition. Rather, we strongly believe that one of the most effective curbs on anticompetitive behavior is operation of normal, undistorted market forces.

Mechanisms are already in place to deal with anticompetitive behavior. The United States and many other States have well-developed antitrust and competition law regimes that apply to firms generally, including airlines. The United States sees no need to develop a sectoral antitrust regime for civil aviation.

Many concerns about perceived anticompetitive practices are essentially concerns about participation and imbalances in the size and competitive strength of the respective parties' airlines. The United States recognizes these realities and has concluded a number of open-skies agreements that include phasing in of full market access and other transition arrangements, provided that the full open-skies provisions apply at a certain date.

In dealing with concerns about fair competition and participation, general competition law and transition arrangements are preferable to sector-specific safeguard mechanisms.

Action by the Conference is in paragraph 4.1.

## 1. INTRODUCTION

1.1 Arguments have been advanced that "safeguards" are necessary to ensure fair competition when governments remove themselves from routine regulation of capacity, pricing and other airline management decisions. In this view, the movement toward a more liberalized aviation environment that gives airlines substantial commercial freedom and flexibility increases the potential for anticompetitive practices and creates a need for governments to rely on new safeguard mechanisms to ensure a fair competitive environment.

1.2 Thus, proposals have been made for parties to a liberalized aviation agreement to establish a code of conduct or specific list of suspect commercial practices, especially regarding capacity and pricing, which allegedly impact adversely on the ability of other carriers to compete or to sustain operations. Further, related proposals have been made for parties to establish a new dispute settlement mechanism to resolve such alleged unfair competitive practices.

## 2. DISCUSSION

### 2.1 Proposed safeguard mechanisms

2.1.1 Proposals for safeguard mechanisms flow from an assumption that the United States does not share: that the removal of restraints on entry, pricing and capacity increases the potential for anticompetitive behavior. Rather, we strongly believe that one of the most effective curbs on anticompetitive behavior is operation of normal, undistorted market forces. Although U.S. policy and law recognize that some limited government intervention may be necessary to redress specific instances of anticompetitive conduct, we do not accept the premise that anticompetitive behavior is more likely to occur in the absence of regulation. Thus, rather than increasing the potential for anticompetitive behavior, the United States expects that full market access and the removal of artificial constraints will promote operation of market forces and promote a healthy competitive environment.

2.1.2 We are concerned that safeguard mechanisms are not compatible with the goal of liberalizing the marketplace environment. Instead, they would replace one kind of government regulation with another that would be equally damaging in stifling real competition and preventing the very benefits that liberalization should bring, e.g., increased service and price options for air transport consumers and stimulation of the world economy.

2.1.3 The fact that different carriers have different advantages and disadvantages is not sufficient justification for the leveling attempt inherent in proposed safeguard mechanisms. A carrier may experience adverse consequences in a market due to its own failure to provide a competitive service, and not due to unfair competition. Proposed safeguard arrangements cannot easily distinguish between harm that results from legitimate competition and harm that results from unfair competitive behavior. Agreeing in advance on an inventory of unfair competitive practices would be extremely difficult. Whether anticompetitive actions have occurred is too dependent on the specific facts of each case to develop a definitive list that would provide useful guidance to parties in consultations or dispute resolution. Typical air services agreements provide for a "fair and equal opportunity to compete", and provide for consultations on any matter relating to the agreement and, if necessary, arbitration on any dispute arising under the agreement. We see no reason to elaborate on a particular class of issues that may give rise to consultations or to subject them to a separate dispute settlement regime.

## 2.2 General competition law

2.2.1 Mechanisms are already in place to deal with anticompetitive behavior. The United States and many other States have well-developed antitrust and competition law regimes that apply to firms generally, including airlines, and cover conduct in international as well as domestic commerce. The United States sees no need to develop a sectoral antitrust regime for civil aviation. Approximately one-quarter of our economy involves foreign trade, yet we have no special antitrust regime for any other sectors.

2.2.2 Concerns have been expressed about differing competition laws that apply to international air transport. However, we see no need to undertake a sectoral effort to harmonize antitrust/competition law regimes with respect to aviation matters. Instead, the United States supports the continuing efforts of competition authorities to promote enforcement cooperation among governments generally, not just in commercial aviation. The Department of Justice and the Federal Trade Commission have developed close bilateral relationships with competition officials in many different countries, including several written understandings with regard to notifications, consultations and cooperation in enforcement. Multilateral guidelines from the Organisation for Economic Co-operation and Development (OECD) also address these cooperation principles. In addition, the two agencies consider international comity in making their antitrust enforcement decisions. The agencies take into account a wide variety of factors in performing a comity analysis, including, *inter alia*, the degree of potential conflict with foreign law or articulated foreign economic policies, the effect on foreign enforcement, and the effectiveness of foreign enforcement. In addition, the Department of Transportation, which has antitrust jurisdiction over certain air transport transactions and activities, has developed productive working relationships with foreign competition authorities.

2.2.3 We recognize that in some international markets, neither bilateral partner has general competition law that applies to air transport, and States in this situation may find it attractive to have an agreed description of unfair competitive practices and a related dispute settlement mechanism. However, for the reasons outlined above, we question the premise for and feasibility of such arrangements, and would urge a great deal of caution.

## 2.3 Transition arrangements

2.3.1 Many concerns about perceived anticompetitive practices are essentially concerns about participation and imbalances in the size and competitive strength of the respective parties' airlines. As a result, some States are reluctant to enter into liberalized air transport agreements. The United States recognizes these realities and has concluded a number of open-skies agreements that include phasing in of full market access and other transition arrangements, provided that the full open-skies provisions apply at a certain date. This gives the other party's airlines time to adjust and prepare for unfettered competition, which we believe is a better way of dealing with participation concerns than to endorse the concept of intervention in the marketplace, without any clear finding or evidence of unfair competitive behavior, as a permanent part of the agreement.

# 3. CONCLUSIONS

3.1 Effective mechanisms are already in place to deal with anticompetitive behavior. These include general competition law, and appropriate transition arrangements and other provisions of bilateral air services agreements. Additional safeguards are not necessary and would compromise the benefits of liberalization.

## 4. ACTION BY THE CONFERENCE

4.1 The Conference is invited to:

a) take the views expressed above into account; and

b) to conclude that in dealing with concerns about fair competition and participation, general competition law and transition arrangements are preferable to sector-specific safeguard mechanisms.

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